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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 210

W. E. WHITMORE,

Appellant,

vs.

R. L. ORMSBEE, COMMISSIONER OF THE BUREAU OF REVENUE, STATE OF NEW MEXICO

STATEMENT AS TO THE JURISDICTION OF THE UNITED STATES SUPREME COURT ON APPEAL TO REVIEW THE JUDGMENT IN QUESTION.

The plaintiff-appellant, having this day presented a petition for appeal, now files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final judgment in question, and should exercise such jurisdiction in this case.*

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*(CLERK'S NOTE.—Identical Jurisdictional Statements were filed in Nos. 211-212 and are not being printed.)

(A)

The Statutory Provision Believed to Sustain the Jurisdiction

This appeal is prosecuted from a final judgment which holds that the license required by Sec. 76-1416, N. M. Statutes Annotated, 1941 Compilation, from radio broadcasting stations is not a burden upon interstate commerce and is not repugnant to the Commerce Clause of the Federal Constitution; said judgment also holds that radio broadcasting is partly intrastate commerce; that this action is primarily one to enjoin and restrain the collection of taxes imposed by and pursuant to the laws of the State of New Mexico; that it would be difficult if not impossible for plaintiff to pay the amounts of taxes, penalties and interest demanded by defendant, and the enforcement of collection of accumulated taxes, penalties and interest might reasonably result in disrupting or discontinuing the service which plaintiff is rendering the public. The District Judge having denied a Motion to Dismiss for jurisdictional reasons, and the 3-Judge Court having proceeded to hear the case on the merits, and having decided that the license demanded by Defendant is not a burden on interstate commerce, holds that the Court has no jurisdiction of this action because of the provisions of Sec. 24 of the Judicial Code (28 U. S. C. A. 41(1)). Uncertainty existed as to whether or not radio broadcasting stations were subject to the excise tax of 2% provided by Chapter 73, Laws of New Mexico, 1935; until recently defendant nor his predecessors in office made no demand of plaintiff for the payment of the taxes, but defendant has now demanded that plaintiff pay as of October 26, 1945, accumulated taxes, penalties and interest, and that plaintiff procure the license required by said Act.

The final judgment here appealed from was entered in

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the District Court of the United States for the District of New Mexico on March 18, 1946, by a statutory court consisting of two Circuit Judges and one District Judge specially convoked under and by virtue of the provisions of Section 266 of the Judicial Code (28 U. S. C. A. 380). The said Court considered the application for interlocutory injunction and the application for permanent injunction at the same hearing. Said section provides:

> "An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case,"

and concludes as follows:

> "The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

Also, Section 238 of the Judicial Code (28 U. S. C. A. Sec. 345) provides for a direct review of an interlocutory or final judgment of a district court by the Supreme Court under Title 28 U. S. C. A., Sec. 380, which is the section involved in these proceedings.

It is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final order, judgment or decree in question by virtue of the express provisions last above set forth.

(B)

The State Statutes Which Are Involved

The plaintiff's complaint contends that Chapter 73, Laws of New Mexico, 1935, being Article 14 of Chapter 76, New Mexico Statutes Annotated, 1941, generally known

as the "New Mexico Emergency School Tax Act," is repugnant to the provisions of Article I, Section 8, Clause 3, of the Constitution of the United States, and is unconstitutional and void insofar as it attempts to exact licenses and privilege taxes from persons, firms or corporations engaged exclusively in radio broadcasting; that by the Federal Communications Act the Congress provided for the exclusive control and jurisdiction of radio broadcasting; that such broadcasting is exclusively interstate commerce; that the Act does not distinguish interstate commerce from local matters such as fairs, races, and dog shows; that defendant was threatening to exercise the summary remedies provided by the statute; that the Act prohibits injunctions; that there is no plain, speedy and efficient remedy available in the Courts of the State of New Mexico. An interlocutory injunction and a permanent injunction are prayed for.

Section 76-1404 (G) New Mexico Statutes Annotated, 1941, as amended, provides in part:

> "Conducting amusements; rate of tax—at an amount equal to two per cent of the gross receipts of the business of every person engaging or continuing in the business of conducting any amusement enterprise, including theatres, picture shows, radio broadcasting stations, location business, sales or punch board operations, carnivals, circuses, amusement parks, menageries, dogshows, horse-shows, fairs . . ."

Said 76-1404 also provides:

> "Privilege taxes—There is hereby levied, and shall be collected by the Bureau of Revenue, privilege taxes . . ."
>
> "Measure of tax—The measure of the tax imposed by this paragraph is the value of the entire production in this state, regardless of the place of sale or the fact that delivery may be made to points outside the state."

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Section 76-1402 of said statutes provides:

> "The term 'gross receipts' means the total receipts of a taxpayer received as compensation for personal or professional services . . . the total receipts of a taxpayer derived from trades, business or commerce, and the gross proceeds of sales . . . without any deduction on account of losses or expenses of any kind."

Section 76-1404 (E) of said laws provides for such tax against public utilities, but restricts the tax to intrastate activities, as follows:

> "(1) Furnishing to consumers electricity or electrical power, natural or artificial gas.
>
> "(2) Transmitting messages or conversation by telegraph, telephone or radio from one point to another point in this state, including all local telephone business.
>
> "(3) Transporting for hire persons or property by railroad, motor vehicle, air transportation, pipe line, or by any other means, from one point to another point in this state . . ."

Section 76-1416 of said statutes provides that no person shall engage or continue in any business within this state, subject to taxation, unless he shall file an application for a license giving such information as may be required, and requiring a fee of $1.00 for such license. Section 76-1417 provides that such license shall be issued upon receipt of the application and payment of the license fee. The license is not assignable and is valid only for the person in whose name it is issued for engaging in the kind of business specified therein. Section 76-1418 of said statutes provides that any person who engages in business without such license shall be guilty of a misdemeanor, and punishable as provided in the Act.

Section 76-1425 provides for penalties of 50% for failure to make a return, with 1% interest per month on the tax and penalty. Section 76-1428 prohibits relief by injunction, but permits payment under protest and suits to recover within four months, which actions can include all protested payments to the date of suit, such as payments made 1, 2 or 3 months before the action. Six per cent interest is provided from the suspense fund upon amounts illegally collected. Such actions must be instituted in the District Court of Santa Fe County, which sits in Santa Fe, the Capital of New Mexico. Section 76-1419 requires monthly payments on or before the 15th day of each month, or as required by the Bureau.

Section 76-1429 provides that the State may enjoin any person who does not pay from engaging or continuing in a business on which a tax is imposed. Section 76-1430 provides that the tax is a personal debt, and may be the subject of a suit. Section 76-1431 provides for collection of the tax by summary methods.

Section 76-1439 provides penalties of up to $500.00 and imprisonment for not more than 3 months for failure to make a return. Section 76-1440 provides a general penalty of up to $500.00 fine and imprisonment for not more than 3 months for violations of the Act not otherwise provided for. This Section would cover failure to procure the State license to operate a radio broadcasting station.

(C)

The Date of the Judgment Sought to Be Reviewed and the Date Upon Which the Application for Appeal Is Presented.

The final judgment here sought to be reviewed was entered and spread of record on March 18, A. D., 1946.

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The petition for appeal herein was presented and filed on April 18, A. D., 1946.

(D)

Statement Showing That the Nature of the Case and of the Rulings of the Court Was Such as to Bring the Case Within the Jurisdictional Provision Relied upon.

At the Special Session of 1934, the Legislature of New Mexico enacted a tax for the privilege of engaging in certain occupations, including radio broadcasting. This Act was superseded by Chapter 73, Laws of New Mexico 1935, which Act is still in effect, as amended from time to time. Uncertainty existed as to whether radio broadcasting stations were liable for such taxes, but the Defendant demanded that such stations pay all taxes, penalties and interest, obtain the license provided by the Act, and file the usual returns, the alleged arrears of taxes, penalties and interest to be paid October 26, 1945. The State refused to institute proceedings in its Courts to test the validity of the Act, and Defendant threatened to resort to summary methods to compel payment, and to require procurement of the license.

This cause was then filed, the Complaint alleging that the taxes, penalties and interest, and the license required by the Act were invalid and repugnant to the Commerce Clause; that radio broadcasting is exclusively interstate commerce, and subject to no regulation other than by the Federal Communications Commission; that no plain, speedy and efficient remedy is available at law, and that the laws involved prohibit an injunction in the State Courts. An interlocutory injunction was sought.

The District Judge called to his assistance two Circuit Judges, pursuant to the provisions of Section 266 of the Judicial Code (28 U. S. C. A., Sec. 380). Prior to the date set for the hearing, the defendant filed a motion to dismiss,

principally on the basis that the Court had no jurisdiction by virtue of the provisions of Sec. 24 of the Judicial Code (28 U. S. C. A. 41(1)), which motion was overruled and denied by the District Judge. Thereafter the case proceeded to trial, the defendant having continued to urge his objections to jurisdiction, and the 3-Judge Court having heard argument and considered briefs with respect to the jurisdictional questions, but having made no ruling thereon subsequent to the denial of the motion to dismiss by the regular District Judge. At the final hearing the Court heard the evidence in the case, and the argument of counsel respecting the character of radio broadcasting, and the validity of the license, taxes, penalties and interest. The Court took the case under advisement, and on March 18, 1946, entered its Opinion, Findings of Fact, Conclusions of Law, and Judgment referred to, *supra*.

The case was heard and determined, and the Judgment entered after substantial questions of law were fully urged and considered by the Court, in substance as follows:

First: No State can burden interstate commerce with a license requirement, regardless of the amount of the fee demanded. The Court construed the license requirement of the Act involved and held that it was not a burden upon interstate commerce, but merely a registration fee required of persons, firms or corporations having a place of business in New Mexico, having and exercising jurisdiction for such purpose, but declining to rule upon other matters involved in the case.

Second: Radio is exclusively interstate commerce, and subject only to control by the Federal Communications Commission.

Third: That there is no plain, speedy and efficient remedy at law or in equity in the Courts of New Mexico;

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that uncertainty exists as to whether or not equity will intervene in the State Courts; that there is no such remedy at law in the Federal Courts.

Fourth: The portions of the New Mexico Act involved herein are repugnant to the Commerce Clause of the Constitution of the United States insofar as they require payment of license fees, excise or privilege taxes, penalties and interest from radio broadcasting stations.

Fifth: That the District Court had jurisdiction of this cause for the purpose of entering an interlocutory injunction and a permanent injunction because the license demanded by Defendant constitutes an attempt to regulate interstate commerce, and having jurisdiction on such ground, the Court had jurisdiction to determine the entire controversy; that Sec. 24 of the Judicial Code (28 U. S. C. A. 41) does not prohibit the jurisdiction of a Federal Court in tax matters, but leaves the situation as it existed before such limitation was provided, to-wit, that Federal Courts of Equity hesitate to intervene in the fiscal affairs of a State in order to avoid disrupting orderly operation, whereas in this case the revenues sought by the State had not been anticipated, and over a long period of years were not demanded from radio broadcasting stations by any official of the State of New Mexico; that large sums of penalties and interest are being demanded as a result of such situation; that the District Judge exercised sound discretion in retaining jurisdiction when denying the motion to dismiss; that it was not the function of the 3-Judge Court to pass upon jurisdictional matters previously ruled upon by the District Judge.

Sixth: That the District Court abused its discretion in failing and refusing to grant an interlocutory injunction and a permanent injunction against the Defendant, after

having retained jurisdiction and construed the New Mexico Act requiring that radio broadcasting stations procure a license from the State of New Mexico, and finding that radio broadcasting is interstate commerce, that the present situation exists due to the uncertainty existing as to whether or not radio broadcasting stations were subject to the provisions of the Act here involved and that it would be difficult if not impossible for plaintiff to pay the amounts demanded, and that payment might reasonably result in disrupting or discontinuing the service which plaintiff is rendering the public.

(E)

Statement of the Grounds upon Which It Is Contended That the Questions Involved Are Substantial

Summary

Six questions are presented to the Court on this appeal:

First: Whether Sec. 76-1416, New Mexico Statutes Annotated, 1941 Compilation, is repugnant to the Commerce Clause of the Federal Constitution. This provision requires that radio broadcasting stations apply for, procure and pay a fee for a State license to operate, providing that failure to do so is a misdemeanor, and prescribing the punishment. It is plaintiff's position that this provision is repugnant to the Commerce Clause, that it has been construed as a license by the Supreme Court of New Mexico; that the District Court was bound by such construction, and that the District Court erred in holding that such requirement was merely a registration and not an attempt to regulate interstate commerce.

Second: Whether or not radio broadcasting is exclusively interstate commerce, or in part intrastate commerce. If it

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is interstate commerce, then no State can regulate radio broadcasting, but, if it is partly intrastate commerce, then any State can regulate to that extent. At what point would State regulation stop, and Federal regulation be exclusive? Would this be determined by the size and power of the Station, the geographical location, or how? It is the position of plaintiff that radio broadcasting is by its very nature interstate commerce, and only subject to regulation by the Federal Government through the Federal Communications Commission.

Third: The District Court held that this action was one primarily to enjoin and restrain the collection of taxes imposed by and pursuant to the laws of the State of New Mexico. The Complaint is based as much upon the license feature, upon penalties, and interest allegedly accrued and demanded by Defendant, upon the threat of interference by Defendant with the operation of radio broadcasting stations engaged in interstate commerce by summary proceedings, or otherwise, as it is concerned with the repugnancy of the taxes demanded to the Commerce Clause of the Federal Constitution.

Fourth: Whether or not the District Court has jurisdiction under the provisions of Sec. 24 of the Judicial Code (28 U. S. C. A. 41-1), after the District Judge had denied a motion to dismiss and retained jurisdiction, and the Court proceeded to try the case and entered a decision construing the license feature of the New Mexico Act. It is plaintiff's contention that the Court not only had jurisdiction for all purposes, but, further, exercised discretion in retaining the cause when the motion to dismiss was denied.

Fifth: Whether the Court abused its discretion in denying an interlocutory injunction, and

Sixth: Whether the Court abused its discretion in denying a permanent injunction under the circumstances existing in this cause.

The Facts

Plaintiff is engaged exclusively in radio broadcasting under license from the Federal Communications Commission; the radio waves broadcast transcend State lines, and are heard in many States and in foreign countries. Since the passage of the New Mexico Sales Tax there has been uncertainty as to the liability of radio broadcasting station to comply with its provisions, but Defendant demanded, not only compliance, but payment of all sums allegedly due, with penalties and interest, and threatened summary proceedings under the provisions of the Act; the plaintiff would find it difficult to maintain normal operations and to meet the demands of Defendant, or by paying all sums involved under protest and attempting to recover through extensive litigation, and such payment might reasonably jeopardize the operation of the radio station in the public interest. Plaintiff did not demand or collect the taxes from patrons during the years involved, as is done by many businesses, by increasing the selling price, and, demand at this time would be a direct burden upon plaintiff; that the business itself is the taxpayer under the New Mexico Act.

Propositions and Authorities

I

Sec. 76-1416, New Mexico Statutes Annotated, 1941 Compilation, is repugnant to the Commerce Clause of the Federal Constitution because of its provision that licenses shall be applied for and taken out by radio broadcasting stations, prescribing a fee therefor, and a penalty for

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failure to comply. The amount of license fees demanded from interstate commerce is not the criterion as to whether it is an invalid regulation thereof, so that it is immaterial that the New Mexico license only requires a fee of $1.00.

Tampa Times v. *Burnett*, 45 F. Supp. 166;
Whitehurst v. *Grimes*, 21 F. (2d) 787;
Atlanta Journal v. *Atlanta Journal Co.*, 186 Ga. 734, 198 S. E. 788;
Postal Telegraph-Cable Co. v. *City of Mobile*, 179 Fed. 955;
Station WBT, Inc. v. *Poulnot*, 46 F. 2d 671.

It will be observed that in the cases cited the local authorities were restrained from interfering with radio by a license or regulation, and no appeal was taken to the Supreme Court for a final determination. Under the case at bar, and what we believe to be conflict with the prior decisions cited, we believe it is important that the Supreme Court finally and effectively determine this matter.

It will be noted that the Supreme Court of New Mexico in the case of *State* v. *Tittman*, 42 N. M. 76, 75 P. 2d 701, held that persons cannot engage or continue in business in New Mexico without the license, that the $1.00 exacted is a nominal charge for issuing the license, and that it is not for revenue raising purposes.

II

The Court held that radio broadcasting is in part intrastate commerce, and in part interstate commerce. If some of the electro-magnetic waves are heard within the borders of New Mexico, and some without the State, the mere fact that there is some interception, possibly the greater part, or even if all of it, within New Mexico would not constitute

radio broadcasting in part intrastate commerce, since the waves are not separable.

Fisher's Blend Station v. *State Tax Com.*, 297 U. S. 650, 80 L. ed. 956, 56 S. Ct. 608.

We believe it is important that the Supreme Court affirm its prior decisions to the effect that radio broadcasting is by its very nature interstate commerce, and thus correct the confusion that will arise as the result of the case of *WDOD Broadcasting Corp.* v. *Stokes*, 180 Tenn. 677, 177 S. W. 2d 837, and the case at bar.

III

The District Court held that this action was primarily one to enjoin and restrain the collection of State taxes, but the Complaint is predicated as much upon the license feature, and upon penalties and interest as it is upon the tax itself. The Court construed the license feature not to violate the Commerce Clause, and then declined jurisdiction because of the "Johnson Act." Having exercised jurisdiction to construe the State Statute, the Court should have proceeded to dispose of the entire controversy. No case should be subject to piece-meal decision.

Meredith v. *City of Winter Haven*, 64 S. Ct. 7, 320 U. S. 228, 88 L. ed. 9, mand. conf. to 141 F. 2d 348, reh. den. 149 F. 2d 1019, and cert. den. 65 S. Ct. 43;

Railroad Commission of California v. *Pacific Gas & Electric Co.*, 58 S. Ct. 334, 302 U. S. 388, 82 L. ed. 319;

Chicago Great Western Ry. Co. v. *Kendall*, 45 S. Ct. 55, 266 U. S. 94, 69 L. ed. 183.

IV

The District Judge denied a motion to dismiss under the provisions of the "Johnson Act," and the 3-Judge Court then convened, heard the evidence and argument of coun-

sel, construed a provision of the State statute, and then entered its Judgment dismissing the cause by virtue of the provisions of Sec. 24 of the Judicial Code (28 U. S. C. A. 41-1), which is generally referred to as the "Johnson Act." This section concludes as follows:

> "Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy and efficient remedy may be had at law or in equity in the courts of such State."

The District Court held that, while the remedy at law in the State Courts might not be adequate, there was a remedy at equity, despite the prohibition against injunctions contained in the Statute, basing this view upon the case of *Lougee* v. *New Mexico Bureau of Revenue Com., et al.*, 42 N. M. 115, 76 P. 2d 6, in which the Court sustained equitable jurisdiction as to a statute requiring suits every 60 days. Subsequently the Act was amended so as to require actions every 4 months, and this provision has never been construed by the Supreme Court of New Mexico as to whether or not equity will intervene despite the prohibition of the statute. The language used in that case, when taken with the change in the law makes the situation highly uncertain in New Mexico, and removes the remedy in this State from the requirements of the "Johnson Act," that the remedy be plain, speedy and efficient. The Johnson Act did not change the situation previously existing.

Great Lakes Dredge & Dock Co. v. *Huffman*, 319 U. S. 293, 63 S. Ct. 1070, 87 L. ed. 1407.

It is suggested that it reasonably appears that private interests will suffer under the circumstances here existing,

and the Court should have retained jurisdiction, and granted relief.

Spector Motor Service, Inc. v. *McLaughlin*, 89 L. ed. 105, —— U. S. ——;
Atlantic Coast Line v. *Daughton, Com.*, 362 U. S. 413, 43 S. Ct. 620, 67 L. ed. 1051;
Corp. Com. of Oklahoma v. *Cary*, 296 U. S. 453, 56 S. Ct. 300, 80 L. ed. 324;
Henneford v. *Northern Pac. Ry. Co.*, 58 S. Ct. 415, 303 U. S. 17, 82 L. ed. 619;
American Airways, Inc. v. *Wallace*, 53 S. Ct. 15, 287 U. S. 565, 77 L. ed. 498;
Hillsborough v. *Cromwell*, 66 S. Ct. 445.

It has been held that a 3-Judge Court is called into existence for the sole purpose of hearing and deciding the matter of injunction, and has no power to either sustain or deny a motion to dismiss the suit. This should be particularly true after a motion to dismiss has been overruled by the District Judge.

J. & A. Freiberg Co. v. *Dawson*, 274 F. 420, aff'd 41 S. Ct. 272, 255 U. S. 288, 65 L. ed. 638.

The determination of lower federal courts regarding jurisdiction to entertain a cause is open to direct review.

Chicot Co. Drainage Dist. v. *Baxter State Bank*, 60 S. Ct. 317, 308 U. S. 371, 84 L. ed. 329, reh. den. 60 S. Ct. 581, 309 U. S. 695, 84 L. ed. 1035.

V and VI

What may be said relative to the refusal to grant an interlocutory injunction would apply to the refusal to grant a permanent injunction, so that these two propositions will be treated together.

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It is urged that the gross receipts privilege tax is clearly repugnant to the Commerce Clause, and that an injunction should have been granted.

Fisher's Blend Station v. *State Tax Com., supra;*
Cooney v. *Mountain State T. & T. Co.,* 294 U. S. 384, 79 L. ed. 934, 55 S. Ct. 477;
Western Livestock v. *Bureau of Revenue,* 41 N. M. 141, 65 P. 2d 863, 303 U. S. 250, 58 S. Ct. 546, 82 L. ed. 823, 115 A. L. R. 944;
Radio Station WBT v. *Poulnot,* 46 F. 2d 691.

It will be remembered that the District Court found the essential basic facts to sustain an injunction, but declined jurisdiction, and, after an extensive discussion of taxation of interstate commerce, declined to decide whether or not the tax provided by the New Mexico act is invalid.

Argument

It is apparent that the New Mexico Legislature did not grasp the interstate character of radio broadcasting, because Sec. 76-1404 quoted *supra,* which provides for taxation of what was apparently deemed interstate businesses such as telephone message, and transportation, specifically provides that only "messages or conversation by telegraph, telephone or radio from one point to another point in this state, including all local telephone business" can be taxed. The same restriction is applied to railroads, motor vehicles, air transportation, etc. Thus there is no attempt to tax interstate telephone or telegraph messages, or communications, but by Sec. 76-1404 radio broadcasting stations were classified as "amusements" along with picture shows, dog-shows, punch-board operations, etc.

The very classification of radio broadcasting by the Legislature discloses lack of understanding of the nature of radio broadcasting, and its exclusive control by the Federal Communications Commission.

Under the decisions of the Supreme Court, supra, gross receipts taxes have been stricken down as an invalid burden on interstate commerce, and the same is true of the requirement for a license. If $1.00 can be exacted for a license, then a larger sum could be exacted, and it is not the amount involved, therefore, that is important, but the power of the State to regulate at all by any sort of license, even though there would be no charge whatever for it.

It is believed that under the Supreme Court decisions cited it has been established that radio broadcasting is exclusively interstate commerce.

The stations in New Mexico have been threatened with large penalties, interest, and various summary remedies, as well as the possibility of criminal prosecution, for nonpayment of the taxes and license fees demanded, after the executive officials of the State had ruled that there was no liability, and no executive official demanded compliance until the Defendant did so some months ago. The District Court found these facts, and the basic irreparable injury essential to sustain an injunction. The Court also construed the license provision of the Act and held that it was not a burden on interstate commerce, but merely a registration fee.

The District Judge exercised the discretion of the Court when he denied the motion to dismiss under the provisions of the Johnson Act, and the 3-Judge Court should have taken the case as they found it, and proceeded to a final determination on the merits. The Court did try the case, but, after construing the license provision, declined jurisdiction. A Federal Court must take a case upon the basis of the Complaint, and, if the Complaint sets up proper grounds of Federal jurisdiction, the Court should proceed with the case to give final and full relief, rather than to have a piece-meal, even though the original ground of Federal jurisdiction is not sustained. Thus, even though the

Johnson Act would prohibit jurisdiction of this case, which it is asserted is not correct, the Court had jurisdiction and exercised such jurisdiction to determine the validity of the license feature, and, therefore, should have proceeded to determine the entire controversy.

The Supreme Court has held that the Johnson Act was only meant to prevent interference by Federal Courts with the orderly administration of a State's fiscal affairs. There is nothing involved here which would bring this case within such a prohibition. The revenues now demanded, with penalties and interest, have not been counted upon by the State, nor budgeted by it as accruing income, because until the advent of Defendant no effort was made to collect or demand these sums. It is also readily apparent that private interests will suffer, unless this Court protects them. It would not be a "Plain, speedy and efficient" remedy for plaintiff to be compelled to resort to lengthy litigation in State Courts, where the outcome is uncertain, with taxes, penalties and interest, as well as summary remedies and prosecution being threatened or possible. If the summary remedies were exercised, as threatened, it might result in sale of the radio station without the sanction of the Federal Communications Commission, to the detriment of the public interest. Such a situation has been prohibited by the Supreme Court in a prior case. (*WOW* v. *Johnson*, 324 U. S. —, 65 S. Ct. 1475, 89 L. Ed. 1397.)

It is urged that this Court has already determined the invalidity of the tax involved as applied to radio stations in *Western Livestock* v. *Bureau of Revenue, supra,* where radio was distinguished from magazine advertising, the Court cited *Station WBT* v. *Poulnot, supra,* with approval, and said:

> "If broadcasting could be taxed, so also could reception . . . In that event a cumulative tax burden would be imposed on interstate communication such

as might ensue if gross receipts from interstate transportation could be taxed."

Therefore, it is hoped that the Supreme Court will not only reverse the Judgment below, but will finally determine the cause so as to afford complete relief to the plaintiff.

(F)

Cases Believed to Sustain the Jurisdiction

The following decisions of this Court are believed to sustain the jurisdiction of the Supreme Court of the United States on a direct appeal to review the final judgment here in question:

Chicot Co. Drainage Dist. v. *Baxter State Bank, supra;*

Shaffer v. *Carter,* 242 U. S. 37, 40 S. Ct. 221, 64 L. ed. 445;

Pacific Telephone, etc. Co. v. *Kuykendall,* 265 U. S. 196, 44 S. Ct. 221, 64 L. ed. 445;

Clark v. *Poor,* 274 U. S. 554, 47 S. Ct. 702, 71 L. ed. 1199;

Query v. *U. S.,* 62 S. Ct. 1122, 316 U. S. 486, 86 L. ed. 1616;

Eichholz v. *Public Service Com. etc.,* 59 S. Ct. 532, 306 U. S. 268, 83 L. ed. 641.

(G)

Statement Respecting Opinion

There is attached hereto, marked Appendix A, the opinion of the District Court entered in this cause. The Court also made and entered certain findings of fact and conclusions of law, which will be a part of the record on appeal.

Respectfully submitted,

LAKE J. FRAZIER,
Attorney for Appellant,
Roswell, N. Mex.

APPENDIX "A"

(Opinion of the Court)

Frazier & Quantius, and Dorothy Ann Kinney, for Plaintiffs.

C. C. McCulloh, Attorney General, Harry L. Bigbee, and Thos. C. McCarty, Assistant Attorneys General, for Defendant.

John Morgan Davis, Milton J. Kibler, and Mechem & Hannett, Amici Curiae.

Before Bratton and Murrah, Circuit Judges, and Neblett, District Judge

OPINION OF THE COURT

By BRATTON, Circuit Judge:

Article 1, section 8, of the Constitution of the United States, empowers Congress to regulate interstate and foreign commerce. Section 301 of the Communications Act of 1934, 48 Stat. 1064, as amended, 50 Stat. 189, 47 U. S. C. §151, et seq., declares that it is the purpose of the Act, among other things, to maintain the control of the United States over all channels of interstate and foreign radio transmission. And by subsequent provisions, a comprehensive system for such maintenance of control is created.

Chapter 73, Laws of New Mexico 1935, is an Act to provide for the raising of revenue for emergency school purposes by imposing an excise tax upon the engaging or continuing to engage in certain businesses, professions, trades and callings for profit in the state. Section 201 of the Act, as amended, 76-1404 N. M. Sts. 1941, among other things, levies a privilege tax in an amount equal to two per cent of the gross receipts upon the business of radio broadcasting, and provides that the tax shall be collected by the Bureau of Revenue. Section 301, 76-1416 N. M. Sts. 1941, provides that no person shall engage or continue to engage in any business within the state, subject to taxation under

the Act, unless he shall file with the commission on application for a license, accompanied by a license fee of $1.00 for each place of business of the applicant. Section 302, 76-1417 N. M. Sts. 1941, provides that upon receipt of the application and the payment of the fee, the commission shall issue the license. Section 304, as amended, 76-1419 N. M. Sts. 1941, provides that the taxes levied thereunder shall be payable in monthly installments, and provides for the making of returns and remittance of the amount of the tax due. Section 307, 76-1422 N. M. Sts. 1941, provides that if the amount paid is less than that due, the deficiency, together with interest thereon at the rate of one per cent per month or fraction thereof, shall be paid upon notice and demand by the commission; that if the commission shall find that any part of the deficiency is due to the negligence of the taxpayer without intent on his part to evade the tax, there shall be added ten per cent of the total amount of the deficiency, together with interest; and that if any part of the deficiency is found to be due to an intent to evade the tax, fifty per cent of the total amount of the deficiency, together with interest, shall be added. Section 310, as amended, 76-1425 N. M. Sts. 1941, provides, inter alia, that if a taxpayer fails to file his return, accompanied by a remittance of the tax due, on the date the same is required to be filed, he may be subject to a penalty of ten per cent of the tax, plus one per cent for each month of the delay. Section 312, 76-1427 N. M. Sts. 1941, provides that if any taxpayer feels aggrieved at any action taken by the commission he may apply for a hearing and a correction of such action; that the commission shall hear the petition promptly, and may grant or deny it; and that if granted, the commission may make such order as may appear to it just and lawful. Section 313, 76-1428 N. M. Sts. 1941, forbids the issuance of any injunction, writ of mandamus, or other legal or equitable process in any suit, action, or proceeding in any court of the state to prevent or enjoin the collection of any tax, penalty, or interest under the Act. It provides that after payment under protest of any such tax, penalty, or interest which is in controversy, the taxpayer may bring in the district

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court of Santa Fe County an action against the Bureau of Revenue for its recovery. It provides that no such action shall be instituted more than four months after the payment under protest. It further provides that in the event judgment is rendered for plaintiff, interest shall be allowed at the rate of six per cent per annum upon the amount found to have been illegally collected, and that the judgment shall be paid out of the suspense fund thereinafter provided. And it also provides that appeals may be taken by either party in the same manner as appeals are taken in civil cases. And section 325, 76-1440 N. M. Sts. 1941, prescribes a penalty for any violation of the Act for which no punishment is expressly provided therein.

W. E. Whitmore owns and operates Radio Station KWEW at Hobbs, New Mexico, with 100 watts power; KGFL, Inc., a corporation organized under the laws of New Mexico, owns and operates Radio Station KGFL, at Roswell, New Mexico, with 100 watts power; Southwest Broadcasters, Inc., a corporation organized under the laws of New Mexico, owns and operates Radio Station KFUN, at Las Vegas, New Mexico, with 250 watts power; and Robert D. Houck, Hoyt Houck, Walter G. Russell, and Lonnie J. Preston, copartners engaged in business under the trade name of Tucumcari Broadcasting Company, own and operate Radio Station KTNM, at Tucumcari, New Mexico, with 250 watts power. The stations are each operated under a license issued by the Federal Communications Commission.

Uncertainty existed among those in interest as to whether owners of radio stations in the state were required to secure licenses, pay the privilege tax, and otherwise comply with the Act of 1935, supra. The state and owners of radio stations seemingly shared the uncertainty. Apparently arising out of that uncertainty, these owners of radio stations failed for several years to make return and pay the tax. But the Commissioner of the Bureau of Revenue lately demanded from Whitmore, as owner and operator of station KWEW, accumulated taxes, penalties, and interest, in the aggregate amount of $3044.69; demanded from KGFL, Inc., as owner and operator of station KGFL, accumulated taxes, penalties and interest, aggregating

$5106.38; demanded from Southwest Broadcasters, Inc., as owner and operator of station KFUN, accumulated taxes, penalties, and interest, totaling $1703.71; and demanded of Houck and his co-partners, as owners and operators of station KTNM, accumulated taxes, penalties, and interest, in the total sum of $1317.36.

Whitmore, KGFL, Inc., Southwest Broadcasters, Inc., and Houck and his co-partners, brought these actions respectively against Bureau of Revenue of the State of New Mexico, and R. L. Ormsbee, Commissioner, seeking to restrain and enjoin the collection of the taxes, penalties, interest, and license fees, on the ground that their exaction contravenes the Constitution of the United States, and the Communications Act, supra. An interlocutory injunction being sought, this specially constituted court was convened in accordance with section 266 of the Judicial Code, as amended, 28 U. S. C. §380. By agreement of the parties, the court consolidated the causes for purposes of the trial. In the course of the submission of the causes on application for an interlocutory and permanent injunction, plaintiff in each case dismissed the complaint as to the defendant Bureau of Revenue, and amended the complaint to name and designate the remaining defendant as R. L. Ormsbee, Commissioner of the Bureau of Revenue.

The jurisdiction of the court to entertain the actions is challenged on the ground that they are suits against the state without its consent. The Eleventh Amendment to the Constitution of the United States withholds from federal courts jurisdiction of actions against a state, brought without its consent. And the consent of a state to be sued in a federal court in respect of matters relating to its fiscal problems must be given either in express language or by clearly indicated purpose. Nothing less will suffice. Great Northern Insurance Co. v. Read, 322 U. S. 47; Ford Motor Co. v. Department of Treasury, 323 U. S. 459. But these are actions against an officer or agent of the state to restrain alleged wrongful action under color of a statute charged to be unconstitutional and therefore void, as applied to the business of plaintiffs, resulting in injury to their rights and property. An action of that kind is not against the

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state, within the meaning of the constitutional provision. Osborn v. Bank of United States, 9 Wheat. 738, 843, 868; Davis v. Gray, 16 Wall. 203, 220; Allen v. Baltimore & Ohio R. R. Co., 114 U. S. 311; Pennoyer v. McConnaughy, 140 U. S. 1, 10; In re Tyler, 149 U. S. 164, 190; Scott v. Donald, 165 U. S. 107, 112; Tindal v. Wesley, 167 U. S. 204, 220; Smyth v. Ames, 169 U. S. 466, 518; Ex parte Young, 209 U. S. 123, 151, 152; Philadelphia Co. v. Stimson, 223 U. S. 605, 620, 621; Shields v. Utah Idaho Central Railroad Co., 305 U. S. 177.

The jurisdiction of the court is challenged on the further ground that these are actions to enjoin the collection of a tax imposed by state law. The presently material part of section 24 of the Judicial Code, as amended, 28 U. S. C. §41, provides that "no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy and efficient remedy may be had at law or in equity in the courts of such State." The power of Congress to limit or withhold from the federal courts jurisdiction in a certain kind or class of cases is not open to doubt. Toucey v. New York Life Insurance Co., 314 U. S. 118, 129; Lockerty v. Phillips, 319 U. S. 182. Therefore, this ground of attack upon the jurisdiction of the court turns upon whether a plain, speedy, and efficient remedy is available to plaintiffs at law or in equity in the courts of the state.

The Act of 1935, supra, entrusts to the State Tax Commission the collection of the tax here in question, as well as penalties and interest. It authorizes an aggrieved taxpayer to submit to the commission a petition for the correction of any error or irregularity. It empowers and makes it the duty of the commission to hear the petition promptly and to correct the error or irregularity, if any. It provides for the payment under protest of a tax which is questioned or disputed, makes adequate provision for the maintenance of an action in the district court of Santa Fe County to recover the amount paid, together with interest at the rate of six per cent per annum, and provides for an appeal to the supreme court of the state. The

remedy thus provided is plain, speedy, and efficient, within the meaning of section 24 of the Judicial Code, supra; and, in ordinary circumstances the availability of that remedy constitutes an effective bar under the statute to the power of this court to enjoin the collection of the tax, penalty, and interest. Adams County v. Northern Pacific Railway Co., 115 F. (2d) 768; Corbett v. Printers & Publishers Corp., 127 F. (2d) 195; West Publishing Co. v. McColgan, 138 F. (2d) 320.

Plaintiffs assert, however, that in the peculiar circumstances presented here the ordinary method of payment under protest is not plain, speedy, or efficient. In support of the contention is the argument that the administrative interpretation of the Act over a long period of time resulted in the accumulation of large sums of tax, penalties, and interest; that payment of such accumulated amounts in a lump sum would be burdensome if not impossible and would jeopardize the service which plaintiffs are rendering to the public, as authorized by the Federal Communications Commission. Assuming, without deciding, that the facts and circumstances, considered in their totality, do render the ordinary method of payment under protest and suit at law for recovery of the sum paid less than a plain, speedy and efficient remedy, plaintiffs can be heard in the state court for equitable relief. The case of Lougee v. New Mexico Bureau of Revenue Commissioner, 42 N. M. 115, 76 Pac. (2d) 6, was an action to enjoin the collection of taxes, penalties, and interest under the Act. The court considered with minute care the several pertinent provisions of the statute, including section 313 which forbids the issuance of an injunction or other legal or equitable process to prevent or enjoin the collection of any tax, penalty, or interest. The court also considered section 13, article 3 of the Constitution of the state which vests in district courts power to issue writs of injunction and other remedial writs in the exercise of their discretion. And the court expressly upheld the equity jurisdiction of the court to entertain the action. After sustaining the jurisdiction of the court to entertain the action, the court held against appellant on the merits. But the opinion of the court makes it clear that

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the state courts may entertain an action for equitable relief against collection of taxes, penalties, and interest, imposed by the Act, if extraordinary circumstances in respect of the operation of the statute bring the case within some acknowledged foundation of equity jurisprudence. The court said:

> "Courts are loath to interfere with the collection of taxes by injunction; and the use of the means provided by law for the securing and collection of taxes will not be enjoined merely because the tax is, or was alleged to be void; but, in addition thereto, there must be exceptional and extraordinary circumstances with respect to the operation of the act, which will bring the case within some acknowledged head of equity jurisprudence * * * The question then is whether, aside from the alleged invalidity of the tax, its hardship, injustice, etc., there are any special and extraordinary circumstances shown to exist which under the rules we have stated authorize the interposition of a court of equity * * * Here appellant must maintain innumerable suits against the identical parties to accomplish one purpose; that is, to determine the constitutionality of the act, or certain parts of it. We hold that there are special and extraordinary circumstances in this case which authorized appellant to resort to a court of equity for relief."

The sweep of the language used in the opinion in that case leaves little room for doubt that if there are special circumstances present here which render the ordinary method of payment under protest and a suit for the return inadequate or inefficient, plaintiffs may be heard in the state courts for equitable relief. And since that remedy is available to them, they cannot be heard here to enjoin the collection of the tax. Adams County v. Northern Pacific Railway Co., supra; Corbett v. Printers & Publishers Corp., supra; West Publishing Co. v. McColgan, supra.

Plaintiffs advance the further contention that they are engaged in interstate commerce; that the exaction of the tax constitutes a burden upon such commerce; and that

therefore the court has jurisdiction to protect them against that encroachment. Plaintiffs are engaged in radio broadcasting; and, while their stations are located in New Mexico, the electro-magnetic waves transmitted from their respective stations cross state lines and their programs are heard by listeners both in New Mexico and in other states. Therefore, the business in which they are engaged is essentially in part intrastate commerce and in part interstate commerce. Fisher's Blend Station v. State Tax Commission, 297 U. S. 650. The power of Congress to regulate interstate commerce is supreme, plenary, and without limitation or restriction, except that prescribed in the Constitution. And within the range of that paramount authority lies the power to protect such commerce against substantial burdens or obstructions, no matter the source from which the encroachment springs. The principle that a state may not impose an undue burden upon interstate commerce by the imposition of a tax or otherwise is so well settled and has been so often declared that a repetition of the reasons underlying the multitude of decisions to that effect would be superfluous. But section 24 of the Judicial Code, supra, expressly withholding from federal courts jurisdiction to enjoin the assessment, levy, or collection of a tax imposed by state law where there is a plain and efficient remedy at law or in equity in the courts of the state, does not contain any provision excluding from its reach cases involving taxes said to constitute a burden upon interstate commerce. It is completely silent in respect of cases involving taxes of that kind as distinguished from other taxes. Statutes couched in absolute language are sometimes held to be subject to limitations. But there is nothing in the text or legislative history of this statute which would warrant this court in reading into it an exception or exclusion which Congress in the exercise of its discretion did not write into it. And if the imposition of the tax, penalty, and interest in controversy does constitute an objectionable burden upon interstate commerce—a question upon which we do not express an opinion—there is no basis for the conclusion that the courts of New Mexico will fail in the discharge of their duty to protect unimpaired every right of plaintiffs in re-

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spect of that encroachment, as state courts bear equal responsibility with the federal courts to guard rights secured by the Constitution of the United States. Robb v. Connolly, 111 U. S. 624, 637; United States v. Bank of New York Co., 296 U. S. 463, 479; Baker v. Atchison, Topeka & Santa Fe Railway Co., 106 F. (2d) 525, certiorari denied, 308 U. S. 620.

Plaintiffs say that section 24 of the Judicial Code, supra, does not contain any restriction upon the jurisdiction of the court to grant equitable relief insofar as the requirements of the Act of 1935, supra, for obtaining a license and the imposition of a penalty for failing to do so are concerned. It is well settled that a state cannot exact by legislation a license tax or a license fee if the direct and necessary effect of the legislation is to impose a burden on interstate commerce. Askren v. Continental Oil Co., 252 U. S. 444; Bowman v. Continental Oil Co., 256 U. S. 642. Section 301, supra, makes it obligatory to file with the State Tax Commission an application for a license before engaging or continuing to engage in business, and it requires that the application be accompanied by a license tax or license fee of $1.00. That nominal sum is not an annual tax or fee. It covers the entire period of time in which the licensee is engaged in the business, no matter how long. The application is to be made on a form prescribed by the commission, and it shall set forth the name in which the business is to be transacted, the location of the place of business, the nature of the business, and such other information as the commission may require. And the commission is not vested with discretion in granting or denying the application. By section 302, it is the duty of the commission to issue the license if the application is in proper form and the tax or fee is paid. Section 301 does not single out persons engaged in interstate commerce for different or discriminatory treatment. It fails to indicate directly or indirectly any hostility toward those engaged in that field of business or industry. It applies alike to all, whether engaged in intrastate commerce, interstate commerce, or both. And its purpose is to obtain information concerning those engaged in business in the state. It is essentially a require-

ment for registration in order to obtain desired information in respect of business being conducted in the state. While plaintiffs are engaged in part in interstate commerce, their broadcasting stations and facilities in connection therewith are located within the state, they buy materials and services from people within the state, and they have multiplied business relations with people within the state outside of the immediate business of broadcasting by radio. There is no warrant for the conclusion that the statute in direct and necessary effect lays a substantial burden upon interstate commerce, within the purview of the commerce clause of the Constitution. Cf. Union Brokerage Co. v. Jensen, 322 U. S. 202.

The actions are severally dismissed without prejudice to the institution of actions in the courts of the state.

(Filed: March 18, 1946)